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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 601

RICHARD McKAY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Richard McKay, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on October 27, 1960. The petition for a rehearing was denied on November 29, 1960.

JUDGMENT AND OPINION OF COURT BELOW.

The judgment of the District Court for the Southern District of Indiana, Indianapolis Division, was entered on January 20, 1960, sentencing the defendant to imprison-

ment to two years on Count I and to five years on Count II, the sentences to run consecutively for a total of seven years. It is not reported, but appears at pp. 33 to 34 of the Appendix certified to this Court by the Clerk of the Court of Appeals.

The opinion of the Court of Appeals for the Seventh Circuit affirming said judgment was filed October 27, 1960. It appears in the Appendix hereto and in the certified copy of the Record. Rehearing was denied on November 28, 1960, and the order appears in the Appendix.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S. Code 1254(1).

QUESTIONS PRESENTED.

I. Does the Fourth Amendment to the Constitution of the United States forbid the nighttime search of a citizen's private dwelling allegedly based upon an "arrest warrant" issued by a "deputy prosecutor" where the so-called warrant of arrest, upon which a search was predicated, was never produced in court it being "missing," and where there was grave doubt of its ever having been issued?

II. Is a nighttime search and seizure in the home of the defendant lawful where a federal narcotic agent conducted the raid and search in consort with State officers where the search was illegal because there was absent a proper arrest or search warrant and there was absent probable cause to justify a nighttime search of a dwelling place without a proper warrant?

III. Should an infringement of the Fourth Amendment to the Constitution of the United States be sanctioned where the so-called missing "arrest warrant" was not pro-

duced in order that its validity might be determined by an examination of the alleged arrest warrant? Even presuming the existence of the so-called arrest warrant (although no court official testified to its existence—other than the police officer who stated he had it issued by a "deputy prosecutor") will this Court sanction the issuance of such arrest warrant by a *deputy prosecutor* when no facts or evidence are brought to the attention of a judge or magistrate but where a deputy prosecutor allegedly issued the arrest warrant?

IV Has not the effect of this court's many admonishments that police officers and prosecutors may not substitute their judgment for that of a judge or magistrate in the issuance of arrest or search warrants been destroyed where the Court of Appeals upholds a search predicated upon an arrest made pursuant to an arrest warrant issued by a "deputy prosecutor"?

V. May a conviction stand when it is based upon the fruits of an illegal search, which search is justified by the arresting officials on the grounds that the officer making the search made an affidavit before a "deputy prosecutor" that he received information from a third man that the defendant had narcotics under the defendant's control, and where the informant neither swore to the affidavit nor appeared before any judge or magistrate and even positively refused so to do?

STATUTES AND RULES INVOLVED.

The Fourth Amendment to the Constitution of the United States; Sec. 174, Title 21, U.S. Code; Sec. 4704(a), Title 26, U.S. Code; Sec. 7607, Title 26, U.S. Code.

These provisions appear in the Appendix hereto.

STATEMENT OF THE CASE.

Petitioner was convicted by a jury upon two counts of an indictment which charged him (1) with purchasing narcotics said narcotic drug being contained in packages which were not in the original stamped packages in violation of Title 26, U.S. Code, Sec. 4704(a), and (2) with receiving and concealing a narcotic drug after unlawful importation in violation of Sec. 174, Title 21, U.S. Code.

Petitioner was sentenced to two years on Count I and two to five years on Count II, the sentences to run consecutive (A. 34).

Prior to trial, the defendant filed his motion to suppress the evidence (A. 5); hearing was had thereon (A. 6-16), and the motion was denied.

The error relied on relates to the denial of the motion to suppress the evidence.

STATEMENTS OF FACTS IN CONNECTION WITH THE MOTION TO SUPPRESS THE EVIDENCE.

The salient facts produced on the hearing to suppress the evidence are as follows:

The defendant was arrested in his house at about 7:30 o'clock at night by two Indianapolis city police officers and one federal narcotic agent (A. 6). Indianapolis police officer Owen testified that at 5:30 in the evening of May 21, 1959, he obtained an arrest for the defendant from a deputy prosecutor. He did not appear before any judge or magistrate. He signed an affidavit against the defendant which stated that he received information from one, Clinton Tucker, whom they had under arrest, that the defendant

had narcotics in the defendant's apartment (A. 6). Tucker was not taken before any judge or examining magistrate to swear to any affidavit. There were four Municipal Criminal Courts in Marion County, two Criminal Courts and at least five Justice of the Peace Courts but the witness testified he did not attempt to obtain a search warrant from any court but only an arrest warrant and this arrest warrant from a "deputy prosecutor" (A. 6-7). The so-called arrest warrant was missing. The witness had searched the clerk's office but could not find it. After the defendant was arrested the so-called warrant was turned in at police headquarters (A. 7).

On cross examination by the government attorney, Officer Owen testified that Clinton Tucker told him that Tucker was supposed to see McKay (called Johnson) at 7:30 that evening and that McKay was leaving town that night. Tucker had told the witness that "Johnson" had an old model Hudson automobile (A. 7).

The defendant testified that when the officers came into his apartment they did not read any warrant of arrest to him (A. 8). The defendant's wife testified that on May 21, 1959, there was a knock on the door; she opened it, federal agent Wilkie and officer Keithley told her to stand aside and officer Owen ran upstairs with a gun in his hand and told the defendant to stand still, not to move. No arrest warrant was read to her or to her husband (A. 8).

In rebuttal, the government produced the following evidence: federal narcotic agent Wilkie testified he was with city police officers Owen and Keithley when he heard part of a conversation with Clinton Tucker before 5:00 P.M. on May 21, 1959. He saw a warrant which Owen had. They went to the defendant's house, Owen knocked on

the door which was opened by defendant's wife. He did not see Owen's gun out but Owen had the warrant in his hand. "We went upstairs where Owen and the defendant were and the defendant looked like he was reading the arrest warrant. Officer Owen handcuffed the defendant". There was no federal warrant at the time of the arrest as he had no authority to secure a warrant on May 21, 1959, but a warrant was authorized on May 22, 1959, after the arrest and search, by the U.S. Attorney's Office (A. 9). On cross examination agent Wilkie testified that the first time he ever saw the defendant McKay was on the day of the arrest "although he was under investigation by our Department for three or four years" (A. 10).

A police woman, Charleene Beeker, testified that a photostatic copy of the arrest slip for May 21, 1959, shows that McKay was arrested on a warrant and the warrant was returned to the Clerk's Office. She did not take the warrant to the Clerk's Office. The houseman at the police station takes them to the Clerk (A. 10).

City police officer Owen testified he did not have a gun in his hand on May 21, 1959, when he went to arrest the defendant. He had the arrest warrant and his brown badge case in his hand. "Clinton Tucker did not go with me to get the affidavit; he said he would give us information but he wouldn't sign anything. I asked him if he would sign a search warrant affidavit . . . ; I also asked him to sign an arrest warrant; he refused to sign either. Upon the information he gave us and information we had and our personal knowledge, I obtained an affidavit and arrest warrant. After filing the affidavit in the clerk's office I took the arrest warrant" (A. 11).

THE EVIDENCE ON THE MOTION TO SUPPRESS DURING THE TRIAL, OUTSIDE THE PRESENCE OF THE JURY.

Police officer Owen testified he searched police headquarters since the defendant's arrest and found no card showing that an arrest was made on a warrant (A. 12). He wrote the name "Richard McKay" on the affidavit after the defendant was arrested when he appeared in the Municipal Court (A. 13).

Bernard Gohman testified he was a deputy clerk of the Municipal Court of Marion County. "When an affidavit is filed we give it a cause number. The affidavit and warrant for the defendant on the pre-narcotics charge was filed on May 22, 1959. . . . Warrants returned by police officers are returned to the clerk's office . . ." (A. 14).

Viola Maxwell testified she was a police woman assigned to the Records Division at the police headquarters. When an officer makes an arrest, he makes out an arrest slip. If the arrest is made on a warrant, the registration clerk puts that on the slate. They then pick up the arrest warrants the following morning at the Registration Office and on the card of the individual who was arrested there would be noted that the arrest was made by warrant if such were made. She did not have at this time a card for "Richard McKay, alias James Johnson" (A. 15-16). *She has worked in the Record Clerk's office for about twelve years and does not know whether or not a warrant was ever issued in this case.* "If a warrant is obtained by a police officer it is brought to our office where we place a stamp on it and make out a card for the individual. All warrants are on white paper" (A. 16).

STATEMENT OF FACTS PRODUCED AT THE TRIAL IN CHIEF.

The salient facts at the trial before the jury are as follows: City of Indianapolis police officer Owen testified he went to the home of the defendant with Officer Keithley and federal narcotic agent Wilkie. He had with him an arrest warrant made out to "James Johnson". The defendant said his name was "McKay" not "Johnson" although he had used the name "James Johnson". "The defendant asked what this was all about and we told him we had information that he had made a sale of heroin earlier that day and that he had heroin in his house. He said he had no narcotics in his house but there were some stolen articles in the house". A search of the apartment disclosed five red capsules of heroin (A. 16-17).

Police Officer Keithley and federal agent Wilkie testified to about the same matters as Officer Owen (A. 18-19) A chemist testified the capsules contained heroin (A. 19). Officer Wilkie was recalled to the stand and testified that the capsules found were not in the original stamped packages and no tax stamp was affixed thereto (A. 20).

REASONS FOR GRANTING THE WRIT.

I.

1. The Court of Appeals failed to hold that the arrest and search of the defendant's apartment was illegal because it was in violation of the Fourth Amendment to the Constitution of the United States.

The Court of Appeals has sanctioned an invasion into a dwelling place at night, and a search of the defendant's premises without a search warrant. In the trial court the government justified the search of the apartment by relying on an alleged "arrest warrant" obtained by the arresting police officer from a "deputy prosecutor" in reliance upon a statement of an arrested informant who would not sign any affidavit or swear to such information on any affidavit. (A. 11) No arrest warrant for the defendant was ever found or produced in court so that its validity could be determined. No warrant to search the residence of the defendant was obtained. No federal warrant had been issued either to arrest the defendant or search his premises.

The Court of Appeals held:

> "We hold that the District Court did not err in overruling the defendant's motion to suppress evidence. In so holding we have not deemed it necessary to decide and have not decided whether the arrest was valid because of the State Warrant". (Ct. Appeals Op., A. 5a).

The Court of Appeals held that the validity of the search turned on whether the officers had probable cause within the meaning of the Fourth Amendment and reasonable grounds, within the meaning of 26 U.S.C.A. Sec. 7607, to believe that defendant had committed or was com-

mitting a violation of the narcotic laws. (Ct. Appeals Op., A. 42).

The court below relied completely on *Draper* v. *United States*, 358 U.S. 307, 310-313. It also relied on *Jones* v. *United States*, 362 U.S. 257 at 269. Neither *Draper* nor *Jones*, as decided by this Court, has eliminated the protection of the Fourth Amendment from the Constitution. If the decision in the Court of Appeals in this case is allowed to stand, then the citizen has no protection by virtue of the Fourth Amendment from a nighttime invasion of his dwelling. It is true that in *Jones* this Court stated, as quoted by the Court of Appeals in its Opinion:

> "In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely on information received through an informant, rather than upon his direct observations, *so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. Draper* v. *United States*, 358 U.S. 307". (Emphasis added).

But then this Court went on to say, in *Jones*, at 269:

> "We there (in Draper) upheld an arrest without a warrant solely upon an informant's statement that the defendant was peddling narcotics as corroborated by the fact that the informant's description of the defendant's appearance, of where he would be on a given morning (matters in themselves totally innocuous) agreed with the officer's observations".

In order to fit the decision in the instant case within the straight jacket of the holding in *Draper*, the Court of Appeals gratuitously found without any sanction in the Record that:

> "Facts in regard to defendant gained by the government narcotic agents and the police, as well as their

own observations strongly corroborated the reports on defendant made by Tucker the informer to them". (Ct. Appeals Op., A. 4a).

Police officer Owen testified he obtained an arrest warrant from "deputy prosecutor" solely relying upon the hearsay information of Tucker that there were narcotics in an apartment (A. 6). Tucker refused to make any affidavit and refused to sign any document to this effect. (A. 11) Officer Owen testified on two occasions; prior to the trial at the hearing on the motion to suppress the evidence (A. 6-7) and during the trial when a hearing was held outside the presence of the jury on the defendant's motion to suppress the evidence (A. 12). On neither occasion did officer Owen state that he had in his possession any other fact than that Clinton Tucker told him that there were narcotics in the apartment of the defendant. His affidavit in support of the arrest warrant issued by the "deputy prosecutor" was "missing". What he said, therefore, in an alleged affidavit could not be tested.

The Court of Appeals has misapprehended the theory of the defendant's motion to suppress the evidence. It held that because federal narcotic agent Wilkie participated in the raid on the apartment in the nighttime that the search of the apartment was valid because Wilkie's knowledge was "strong corroboration". The whole of Wilkie's testimony in connection with the motion to suppress the evidence appears at Appendix 9 and 10. He stated he heard part of the conversation with Clinton Tucker and that while he was at the police department talking to Tucker, Owen left "and later came back with the warrant which I saw". They went to the home of the defendant and there was a 1954 Hudson. Tucker had said that the defendant had an old Hudson. Wilkie further said he knew the defendant to be a narcotic peddler in Chicago; that they had that

information since 1956; and that the day of the arrest was the first time he ever saw the defendant although the defendant "was under investigation by our department for three or four years" (A. 10).

It is significant to note here that although the defendant "was under investigation by our department for three or four years" Wilkie did not aid police officer Owen in inserting the name of McKay on the so-called arrest warrant. The name "McKay" was inserted in the warrant and in the affidavit after the arrest of McKay (A. 13).

But there was no corroboration by facts *within the personal observation of the agent or officers*. In *Draper*, in addition to the usual corroboration made by the arresting narcotic agents, there was testimony that the informer had been previously found to be reliable. There was no such testimony in the instant case. To the contrary, the informer refused to go before any judge and make any sworn statement (A. 11).

In *United States* v. *Jones*, 362 U.S. 257, 4 L. ed. 697, this Court had for its consideration the determination of the validity of a search warrant issued by a U.S. Commissioner upon the hearsay affidavit of a narcotic agent. This Court said at 708:

> "It is not suggested that the Commissioner doubted Didone's word. Thus we may assume that Didone had the day before been told by one who claimed to have bought narcotics there that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;* but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. His story was corroborated by other sources of information . . ." (Emphasis added).

In *Draper*, there was no search of a dwelling place; there was an arrest on the street. In *Jones*, there was a search of a dwelling place *after* an application for a warrant to a U.S. Commissioner. In the instant case there was a nighttime search of a dwelling without a search warrant, with a suspect and questionable "arrest warrant" issued by a "deputy prosecutor", which warrant and supporting affidavit were not produced by the government at the trial. They were conveniently "missing". The Court of Appeals held that narcotic agent Wilkie's knowledge that defendant had been "under investigation" for three or four years was sufficient corroboration of the hearsay of informant Tucker, even though agent Wilkie did not know the name of McKay. The only other fact corroborative of Tucker's story was that Tucker said that the defendant had an old Hudson and a 1954 Hudson was observed on the street in front of defendant's home. The Hudson turned out to be owned by Mrs. McKay (A. 14).

We submit that the authority under *Draper* to search a dwelling without a warrant has its limits. This Court should grant certiorari to define those limits under the unusual circumstances of this case. Without this Court's limiting its holding in *Draper*, the Fourth Amendment is being whittled away to nothingness. The facts in this case represent a classic example of the concern expressed by Justice Douglas in his dissent in *Jones*: "Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects".

2. In *Byars* v. *United States*, 273 U.S. 28 at 33. Your Honors stated:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and

seizures both in England and the Colonies; and the assurance against any revival of it, so correctly embodied in the fundamental law is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right".

The failure of the police officers to produce the so-called warrant and the alleged affidavit in support thereof causes suspicion to fall upon the police officers. There was no showing before whom the affidavit of officer Owen was made, except perhaps to a "deputy prosecutor". Absent the warrant and the supporting affidavit how could there be a proper attack upon the validity of the warrant? (See *United States* v. *Pearce*, 7 Cir. 275 F.2d 318, 321-323, wherein the affidavit of the FBI agent was shown to be false).

Also, this Court's holding in *United States* v. *Giordenello*, 357 U.S. 480, permits a hearing to determine the validity of the warrant. The defendant was precluded from demonstrating the falsity or insufficiency of the affidavit by the failure of the police to preserve and produce the alleged affidavit and warrant.

Is not a defendant denied a substantial constitutional right when he has been effectively thwarted from being permitted to make such a showing?

This Court should take jurisdiction to express its opinion in this connection as a guide in future cases where the affidavits and warrants might become conveniently "missing."

CONCLUSION.

For all of the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES,
Attorney for Petitioner.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12942 SEPTEMBER TERM, 1960 SEPTEMBER SESSION, 1960

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RICHARD McKAY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

October 27, 1960

Before SCHNACKENBERG and KNOCH, *Circuit Judges,* and MERCER, *District Judge.*

SCHNACKENBERG, *Circuit Judge.* Upon the verdict of a jury, following a plea of not guilty, the district court convicted Richard McKay, defendant, of narcotic law violations, 26 U.S.C.A. § 4704 (a) and 21 U.S.C.A. § 174, as charged in counts I and II of an indictment. From consecutive sentences on the verdict, defendant has appealed.

Defendant contends the court erred in overruling his motion to suppress evidence seized in his home after he had been arrested there by Indianapolis police officers, who had gone to the home of John Wilkie, Jr., a federal narcotics agent.

Before the trial started, the court conducted a hearing on defendant's motion to suppress, and at the trial, out

of the presence of the jury, conducted a similar hearing upon an objection by defendant seeking to suppress such evidence. We now state certain facts shown on these hearings when the court refused to sustain defendant's position

On May 21, 1959, the police officers and Wilkie were informed by Clinton Tucker, a drug addict on parole, that 41 capsules of heroin, buried in his back yard and recovered by the police, he had obtained from a man known as James Johnson[1] who had capsules of heroin in his apartment at 729 Congress Avenue, in Indianapolis, where Tucker was to receive about 150 additional capsules at 7:30 o'clock that same evening, and that Johnson was about to leave town for Chicago in a described automobile, which would be sitting in front of the house. Police Sergeant Owen's testimony shows that he had learned from Tucker that on previous occasions Tucker had seen narcotic drugs in defendant's house and had obtained them from him. Based upon these facts, Sergeant Owen went to the Marion County prosecutor's office and swore to an affidavit charging defendant with a violation of the Indiana Narcotics Act.[2] He obtained a warrant for arrest from the deputy prosecuting attorney, all according to standard procedure in Indiana. The affidavit, along with a warrant, was taken by Sergeant Owen from the prosecutor's office to the clerk of the court, where they were file-marked. The affidavit was retained in the clerk's office and Sergeant Owen took the warrant.[3]

Sergeant Owen, Sergeant Keithley and Wilkie proceeded to 729 Congress Avenue where they observed an automobile fitting the description previously given them. Owen's knock on the house door was answered by defendant's wife who asked "Who is it?" Owen said "Tuck". She opened the door, Owen showed her his badge and identification card, and in his right hand he had the arrest warrant. He asked her if James was at home and she said "upstairs".

---

[1] Johnson said his name was Richard McKay.
[2] § 10-8538(b), 4 Part 2, Burns Indiana Statutes, Annotated.
[3] The Indiana procedure for the issuance of warrants may be found in § 9-1001, 4 Part 1, Burns Indiana Statutes, Annotated.

Then Keithley and Wilkie talked to her and Owen went upstairs and was met by defendant at the top of the stairs. Owen showed him his badge and identification and read the warrant to him. He also handed the warrant to defendant who read it and returned it to the officer. It is not disputed that these facts show that defendant was then arrested. Defendant's wife, Wilkie and Keithley came up to the room.

There were cameras, luggage, blankets and electrical appliances around the room and defendant said that most of them were stolen. He walked around pointing out those which were stolen and those which were "ours". Packed suitcases were in the room. Owen asked defendant if he had any heroin there and defendant stated he had no narcotics on his premises. After he was arrested, defendant was sitting directly by a small dinette table upon which was a napkin box. The room was about 12 x 16 feet. Defendant sat a foot or two from the table. Owen noticed there were several napkins on top that looked disturbed and he picked the box up and removed a few napkins from the top and saw a large ball of tin foil or aluminum foil, "right by Mr. McKay", defendant. The attention of Wilkie and Keithley was called to this fact. As Owen opened this ball he discovered several capsules containing a white powder and defendant said the capsules were his. A field test was made and showed that the powder was a derivative of opium. 21 U.S.C.A. § 171 (a).

For six months prior to the arrest the police had been investigating defendant vigorously. They had information obtained from drug addicts and other people in Indianapolis known to the police by this nicknames—"Rabbit", "Lightning" and "Ham Man".

Defendant was taken to police headquarters where he was released on bond and at a subsequent court hearing the state caused the case to be dismissed. Sergeant Owen testified that he filed the arrest warrant at the police station in Indianapolis, but not in the court clerk's office. No arrest warrant for defendant has been found. No warrant to search the residence of defendant was obtained.

At the time defendant was arrested by the police no federal warrant had been issued. Such a warrant was obtained on May 22, 1959 from the United States commissioner by agent Wilkie, who had known since 1956 that the defendant was a narcotics peddler in Chicago and that he was under investigation "by our department for three or four years".

1. Defendant in this court argues that his motion to suppress evidence should have been sustained as the arrest of defendant and subsequent search of his premises were illegal. The government responds that the search of defendant's premises was incident to a valid arrest and not unreasonable.

The government here and in the court below (cf. *Giordenello* v. *United States*, 357 U.S. 480, 488) has relied on two independent alternate contentions to sustain the judgment and sentence of the district court: first, the arrest was valid because there was sufficient evidence of probable cause to justify the arrest of defendant without a warrant, and second, the arrest was valid because there was sufficient basis for the issuance of the state warrant upon which defendant was arrested.

If, in either case, the arrest was valid, the finding of the heroin in defendant's room, under the circumstances of this case, occurred in a reasonable search incidental to his arrest and a search warrant was not required. *United States* v. *Rabinowitz*, 339 U.S. 56, 66.

Facts in regard to defendant gained by the government narcotics agents and the police, as well as their own observations, strongly corroborated the reports on defendant made by Tucker the informer to them. They were obviously men of experience in their fields, Wilkie having been employed as a federal narcotics agent for about 9 years. Even though the information that Tucker gave to the officers and Wilkie was hearsay, they were legally entitled to consider it in determining whether there was probable cause, within the meaning of the Fourth Amendment, and reasonable grounds, within the meaning of 26 U.S.C.A.

§ 7607, to believe that defendant had committed or was committing a violation of the narcotic laws. *Draper* v. *United States*, 358 U.S. 307, 310-313. To the same effect is *Jones* v. *United States*, 362 U.S. 257, where the court said, at 269:

> "In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. *Draper* v. *United States*, 358 U.S. 307. • • •"

In *Draper*, at 313, the court said:

> "• • • Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132, 162."

Defendant relies upon *Henry* v. *United States*, 361 U.S. 98, where the court said, at 102:

> "• • • And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause. *Carroll* v. *United States*, *supra*, at 155-156."

The court on the facts in that case concluded that the officers had not seen enough to permit them to believe that petitioner was violating or had violated the law. The court reviewed the relevant facts, at 103-4. Those facts differ so much from those in the case at bar as to readily distinguish *Henry* from our case. The facts in *Draper* and *Jones*, *supra*, are essentially the same as those before us insofar as establishing probable cause for arrest

without a warrant is concerned. We believe that the result which we reach is not inconsistent with anything said in *Elkins* v. *United States*, 364 U.S. 206, or *Rios* v. *United States*, 364 U.S. 253.

We hold that the district court did not err in overruling defendant's motion to suppress evidence. In so holding we have not deemed it necessary to decide and have not decided whether the arrest was valid because of the state warrant.

2. Defendant in the district court objected to instructions in which the court informed the jury:

> "In Count I of the Indictment the defendant in this case is charged with the violation of Title 26, United States Code, Section 4704 (a). This Section reads, in its pertinent parts, in the words of the Statute, as follows:
>
> > 'It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs, except in the original stamped package, or from the original stamped package.'
>
> "In Count II of the Indictment the defendant in this case is charged with a violation of Title 21, United States Code, Section 174. This Section reads, in its pertinent parts, in the words of the Statute, as follows:
>
> > 'Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States contrary to law, or receives, conceals, buys, any such narcotic drug after being imported or brought in, knowing the same to have been brought in—into the United States contrary to law'
>
> shall be punished in a certain manner as provided in the Statute.
>
> "The essential elements of the offense charged in Count I of the Indictment are, (1) the purchase, selling, dispensing, or distributing; (2) of narcotic drugs; (3) except in the original stamped package, or from the original stamped package.

"I instruct you that the Statute under which defendant is charged in Count I of the Indictment further provides: 'the absence of appropriate tax paid stamps from narcotic drugs shall be prima-facie evidence of a violation of this sub-section by the person in whose possession the same may be found.'

"I instruct you that the phrase 'prima-facie evidence' as used in this Statute, means that if you find from all the evidence that the defendant possessed narcotic drugs without the appropriate tax paid stamps, then if the evidence fails to explain or justify such possession, then you may infer that the defendant in whose possession narcotic drugs were found, if you so find beyond a reasonable doubt, has violated this Statute.

"The essential elements of the offense charged in Count II of the Indictment are, (1) the receiving, buying or concealing of a narcotic drug (2) which has been imported or brought into the United States contrary to law; and (3) knowing that such narcotic drug has been imported or brought in contrary to law.

"The Statute under which the defendant is charged in Count II of the Indictment also provides that: 'whenever on trial for a violation of this sub-section, the defendant is shown to have, or to have had, possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'

"By force of this provision of said Statute, the possession, if any, of a narcotic drug, gives rise to an inference that the narcotics were imported contrary to law, and a further inference that the person in possession had knowledge of such unlawful importation.

"These inferences may be overcome by evidence which tends to establish that in this case the possession of narcotic drugs by the defendant, if any such possession is found, did not involve a violation of the Statute, either because the narcotics were not

imported contrary to law or because the defendant had no knowledge of unlawful importation.

"I instruct you that to have possession of narcotic drugs as used in these instructions means that such narcotic drugs, if any, must be in one's control, or under one's dominion.

"Knowledge is a mental element of crime, and is difficult to prove by direct evidence. The existence of such an element may be inferred, however, from acts and conduct.

"It is impossible, as you know, to look into a defendant's mind and determine what existed at a given time.

"Knowledge may be inferred from acts, although each act standing by itself may seem unimportant. This is a question of fact to be determined from all of the evidence."

Defendant now argues that he was entitled to have the jury determine the facts of the case, and an instruction in a criminal case as to what evidence will be sufficient to establish any ultimate fact invades the constitutional[4] right of the jury to determine the facts and is therefore error. He says that the legislature has no more right to invade the province of the jury than the court, and it cannot invest the court with the power to do so. He relies upon *Chaffee & Co.* v. *United States,* 85 U.S. 516, 545.

In *Casey* v. *United States,* 276 U.S. 413, the constitutionality of a statutory presumption created by possession of narcotics was sustained. At 418, the court said:

"With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact proved and the ultimate fact presumed.' *Luria* v. *United States,* 231 U.S. 9, 25; *Yee Hem* v. *United States,* 268 U.S. 178, 183. Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. *Greer* v. *United*

[4] He relies on the Fifth and Sixth Amendments to the Constitution of the United States.

States, 245 U.S. 559. The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, § 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence, § 2486. In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by a breach of law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law. The petitioner cannot complain of the statute except as it affects him."

The court affirmed a conviction in that case. To the same effect, see *Harris* v. *United States*, 359 U.S. 19, 23.

We believe that the conclusion which we reach is in accord with established principles and that the criticized instructions are not erroneous.

Our decision in *Duncan* v. *United States*, 23 F.2d 3, is clearly distinguishable from the case at bar. There no statute in regard to the creation of prima facie evidence of a violation was involved. We were of the opinion that the instruction given in *Duncan* required the defendant to explain to the *satisfaction of the jury* the possession of recently stolen property, which instruction was sufficient to give the jury the impression that the burden had shifted to the accused to *satisfy* the jury of his innocence. Of course, we reversed the judgment of conviction in that case.

For the reasons herein stated, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Thursday, October 27, 1960

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Frederick O. Mercer, District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
No. 12942
RICHARD MCKAY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

IN THE

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago 10, Illinois

Thursday, November 29, 1960

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Frederick O. Mercer, District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
No. 12942
RICHARD McKAY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

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It is ordered by the Court that appellant's petition for rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX C.

STATUTES AND LAWS.

FOURTH AMENDMENT TO THE CONSTITUTION

The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SECTION 7607, TITLE 26, U. S. CODE

Additional authority for bureau of narcotics and bureau of customs.

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401 (1), may—

* * *

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

SECTION 174, TITLE 21, U. S. CODE

Whoever fraudulently or knowingly imports or brings in narcotic drug into the United States . . . Contrary to law, or receives, conceals, buys, sells or in any manner facilitates transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing

the same to have been imported or brought into the United States contrary to law . . . Whenever on trial for a violation of this Section, the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

SECTION 4705(a) TITLE 26, U. S. CODE

It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is resold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.